

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Dirk Alan Christianson,

Plaintiff,

vs.

Barb Morovits,

Defendant.

**ORDER ADOPTING REPORT AND
RECOMMENDATIONS**

Civil No. 3:10-cv-37

Plaintiff Christianson filed a complaint (Doc. #11) and various supplements to the complaint (Docs. #14, 15) pursuant to 42 U.S.C. § 1983. The Court has received a Report and Recommendation from the Honorable Karen K. Klein, United States Magistrate Judge, pursuant to 28 U.S.C. § 1915A, recommending that:

- 1) Christianson's complaint be dismissed with prejudice;
- 2) The Court certify that an appeal from the dismissal of this action may not be taken *in forma pauperis* because such an appeal is frivolous and cannot be taken in good faith; and
- 3) A certificate of appealability not be issued with respect to any of the issues raised by Christianson in this action.

Christianson filed an objection to the Report and Recommendation (Doc. #17), a supplement to that objection (Doc. #21), and various letters which essentially repeat his objections to the Report and Recommendation (Docs. #20, 22, 23). In one letter to the Court (Doc. #23), Christianson asserts that he injured himself while making his bed. Christianson asserts that he asked Morovits and other Tompkins Rehabilitation and Corrections Center staff for assistance, but was denied assistance (Doc. #23). These factual allegations were not included in his original complaint or supplements to his complaint, and thus,

were not considered by Magistrate Judge Klein.

When an individual includes new factual allegations in an objection to a Report and Recommendation, the document should be treated as a Motion for Leave to Amend Complaint. Thornton v. Phillips County Arkansas, 240 F.3d 728 (8th Cir. 2001). Rule 15 of the Federal Rules of Civil Procedure allow a plaintiff to amend his complaint without leave of court within 21 days of filing his original complaint. Following the 21 day period, the Court may, “on motion and reasonable notice,” permit the plaintiff to amend his complaint on “just terms.” F.R.Civ.P. 15. The Court has reviewed Christianson’s Motion to Amend Complaint as well as all other documents in this case and finds that allowing Christianson to amend his complaint would not change the Magistrate Judge’s or this Court’s decision. Christianson’s Motion to Amend Complaint is hereby **DENIED**.

Additionally, the Court has reviewed the Report and Recommendation as well as Christianson’s objection and finds Magistrate Judge Klein’s recommendation well-reasoned, persuasive, and free from error. Accordingly, the Court hereby adopts the Report and Recommendation in its entirety.

Based upon the entire record before the Court, dismissal of the complaint is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. Therefore, a certificate of appealability will not be issued by this court. See Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997) (holding that a district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c)). If the petitioner desires further review of his complaint, he may request the issuance of a certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with Tiedeman v. Benson, 122 F.3d 518, 25-52 (8th Cir. 1997).

Additionally, the Court finds that any appeal would be frivolous, could not be taken in good faith, and may not be taken *in forma pauperis*. See 28 U.S.C. § 1915(a)(3) (“An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.”); see also Coppedge

v. United States, 360 U.S. 438, 444-45 (1962).

For the foregoing reasons, Christianson's Motion to Amend Complaint is **DENIED**.
Christianson's complaint is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 29th day of September, 2010.

/s/ Ralph R. Erickson
Ralph R. Erickson, Chief District Judge
United States District Court